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No. 00-795

In The Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*,
PETITIONERS,
v.

FREE SPEECH COALITION, *ET AL.*,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, AND THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, NATIONAL COALITION FOR THE PROTECTION OF CHILDREN & FAMILIES, AND THE FAMILY RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

Amici Curiae, the National Law Center for Children and Families, the National Coalition for the Protection of Children and Families, and the Family Research Council, hereby move this Honorable Court for an order, pursuant to Rule 37(b), granting leave to file the attached BRIEF *AMICI CURIAE* in support of Petitioners.

Consent was granted by Petitioners and withheld by Respondents.

The National Law Center for Children and Families (NLC) is a Virginia non-profit corporation and educational organization specializing in supporting law enforcement through training, advice, legal research and briefs, and direct trial and appellate assistance to federal, state, and local prosecutors, police agencies, and legislators throughout the United States and in several foreign countries.

The NLC focuses on constitutional, legislative, trial, law enforcement, and other legal issues related to obscenity, child pornography and sexual abuse, broadcast indecency, Internet and World Wide Web regulations and legal obligations, display and dissemination of materials harmful to minors, prostitution, public nuisances, indecent exposure, and the regulation, licensing, and zoning of sexually oriented businesses.

NLC has filed numerous friend of the court briefs in this Court and in other federal and state cases involving First Amendment issues, including; *Alexander v. United States*,

509 U.S. 544 (1993) (RICO-obscenity, forfeiture); *Knox v. United States*, 510 U.S. 939 (1993), *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1994), and *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), and *Crawford v. Lungren*, 520 U.S. 1117 (1997) (adult token news racks for magazines harmful to minors); *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996) (computer BBS obscenity); and *Free Speech Coalition v. Reno*, N.D. Cal. (1997), unpublished, No. C97-028SC, 1997 WL 487758, and Ninth Circuit No. 97-16536, 198 F.3d 1083 (9th Cir. 1999) (computerized child pornography, 18 U.S.C. 2252A). NLC's Counsel of Record herein was also trial and appeal counsel for the Department of Justice, Child Exploitation and Obscenity Section, in *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), and NLC's co-counsel herein was also on the brief in the Fifth Circuit in that case.

The National Coalition for the Protection of Children & Families (formerly known as "N-CAP" or the National Coalition Against Pornography) is a national public education and citizen advocate organization that works to increase public awareness of the harm caused to the American family by obscene, indecent, and other pornographic and harmful materials. The Coalition is active at local and national levels, both in this country and in countries around the world, in its efforts to educate the public on the harms which illegal, violent, and degrading pornography inflicts upon children and families.

The Coalition has formed local and regional citizen organizations in communities across the Country in order to bring local and national leadership to this important issue and operates a Model Cities America program to foster participation by community, civic, religious, and business

leaders to assist public officials and law enforcement efforts to improve and enforce existing laws against unlawful pornography and sexually oriented business activities. Its Chairman is the Reverend Dr. Jerry Kirk and its President is Frederic R. Schatz, M.B.A.

The Coalition is also an affiliate of the Religious Alliance Against Pornography ("RAAP"), which is an international organization of church and religious leaders to educate people about the destructive influence of pornography and its offense to public morality, private virtue, and religious principles. The co-chairmen of RAAP are His Eminence William Cardinal Keeler, Archbishop of Baltimore, and the Reverend Dr. Kirk.

Family Research Council, Inc. (FRC) is a non-profit organization acting as a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues that affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy initiatives to preserve and protect the family, and has particular knowledge about the harms of child pornography and the sexual exploitation of children that will be helpful to the Court in this case.

FRC has filed *amicus curiae* briefs involving First Amendment issues in this Court and in federal and state appellate courts including: *Alliance For Community Media, et al., v. FCC, No. 95-227 (consolidated with Denver Area Educ. Telcoms. Consortium, Inc. v. FCC,* 518 U.S. 727

(1996)(cable indecency); *ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) (Communications Decency Act, "CDA")*; *ACLU v. Reno*, 217 F.3d 162 (3rd Cir. 2000), *cert. petition pending*. FRC's Senior Director of Legal Studies, co-counsel herein, has also filed briefs involving First Amendment issues with this Court, *Knox v. United States*, 513 U.S. 1109 (1995) (child pornography); *Crawford v. Lungren*, 520 U.S. 1117 (1997) (material harmful to minors); and in federal and state appellate courts: *Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996) (material harmful to minors); *State v. Stoneman*, 323 Ore. 536; 920 P.2d 535 (1996)(child pornography); *People v. Wiener*, 29 Cal. App.4th 1300 (1994) (obscenity).

These organizations and/or their counsel herein were active in advising Members of Congress on the Child Pornography Prevention Act and provided testimony to the Senate Hearing on the CPPA. These *amici curiae* have a committed interest in supporting the constitutionality of the Act in the careful and narrowed way intended by Congress and wish to provide arguments to the Court in this regard.

For these reasons, we pray that this Honorable Court grant this Motion for Leave and accept the attached Brief.

Respectfully submitted,

J. Robert Flores
Counsel of Record

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INTEREST OF *AMICI CURIAE*

Your *amici curiae*, the National Law Center for Children and Families, of Fairfax, Virginia, the National Coalition for the Protection of Children & Families, of Cincinnati, Ohio, and the Family Research Council, of Washington, D.C., are non-profit educational and public interest organizations with historically active roles in America's state and federal efforts to enact valid laws regulating obscenity, child pornography, indecency, materials that are harmful to minors or obscene for minors, and to educate public officials, law enforcement officers, and the public on the just and fair enforcement of such laws and on the harmful effects of such materials on society and individual victims. The commercial and public circulation of pornographic images of children is the most extreme form of the "crass commercial exploitation of sex" and your *amici* share the concerns of Congress and the public in defending the necessity and constitutionality of the Child Pornography Prevention Act of 1996 ("CPPA") and hereby present arguments that were reflected in the Act and may not otherwise be presented to the Court by the parties.[1]

The National Law Center for Children and Families (NLC) also filed briefs *amicus curiae* in both the District Court for the Northern District of California and in the Court of Appeals for the Ninth Circuit below.

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[1] This Brief *Amici Curiae* was authored in whole by Counsel of Record J. Robert Flores and co-counsel Bruce A. Taylor of the National Law Center for Children and Families, with contribution by co-counsel Janet M. LaRue of Family Research Council, and no part of the brief was authored by any attorney for a party. No person or entity other than these *amici curiae*, their members, or counsel, made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

SUMMARY OF ARGUMENT

The CPPA, 18 U.S.C. § 2252A, was enacted to address the Government's compelling need to protect children by maintaining its ability to investigate and prosecute actual child pornography, as well as graphic images that are virtually indistinguishable from actual child pornography and pose the same real dangers to children.

Publicly available computer and photo imaging technologies had progressed to the point that images could be altered or wholly created without an actual minor performing the sexual conduct, but which appear to viewers to be actual photos of real children engaging in sex. Such counterfeit child pornography presents a clear and present danger to real children by inciting pedophiles to molest and seducing children into abuse. These were the inescapable realities resulting from the legislative record assembled by Congress in 1995-96. *See* SENATE REPORT to accompany S. 1237, S. Rep. No. 104-358; CONGRESSIONAL FINDINGS for Pub. L. 104-208, Title 1, § 121, preamble to S. 1237, reported as annotations to 18 U.S.C. § 2251; and testimony at the Senate Hearing of June 4, 1996, *Child Pornography Prevention Act of 1995: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1996).

The CPPA addressed this threat to minor children and to the Federal statutory scheme by prohibiting the interstate and foreign shipment, distribution, receipt, reproduction, sale, and possession of "child pornography" where "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2252A, 2256 (8)(B). The CPPA also prohibits traffic in "child pornography" where "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. §§ 2252A, 2256 (8)(D).

Congress found these modernizations necessary to protect children in the Internet age. These *amici* submit that the Act is constitutionally valid under the First Amendment.

These *amici* submit, as a primary factor in CPPA's constitutionality, that § 2252A only prohibits knowing traffic in that type of "child pornography" under § 2256 (8) that is indistinguishable from actual photographic child pornography. In other words, only images that are or appear to have been produced in violation of § 2251 and contraband under § 2252 are "child pornography" under § 2252A.

Congress made this legislative intent explicit in narrowing the scope of the Act, as written and as it must be authoritatively construed, to apply only to the distribution, receipt, and possession of such realistic "counterfeit," "synthetic," or apparently authentic "virtual" child pornography that it appears to be an actual child being sexually exploited or abused or conveys the impression that it is an actual child subjected to sexually explicit conduct. The act of knowingly distributing or possessing such real or apparently authentic child pornographic images is not speech entitled to protection under the First Amendment and Congress may declare such materials contraband and banned from the streams of interstate and foreign commerce.

The CPPA has been upheld by four courts against the same challenges that have been raised in this case. The Court of Appeals for the First Circuit ruled in *United States v. Hilton*, 167 F.3d 61, 65 (1st Cir. 1999): "We hold that the law, properly construed, survives Hilton's facial constitutional challenge. It neither impinges substantially on protected expression nor is so vague as to offend due process." The Court of Appeals for the Eleventh Circuit ruled in *United States v. Acheson*, 195 F.3d 645, 648 (11th Cir. 1999): "[W]e hold the CPPA puts a reasonable person on notice of what conduct it prohibits, is not substantially overbroad, and does not run afoul of the First Amendment." The U.S. District Court for the District of Utah held in

United States v. Pearl, 89 F.Supp.2d 1237, 1246 (D. Utah 2000): "Having carefully considered the Circuits' split of authority on the issue of the constitutionality of the CPPA on the issues of vagueness and overbreadth, this court concludes that the rationale contained in *Hilton* is persuasive. This court concludes, in agreement with *Hilton* and *Acheson*, for the reasons stated therein, that the CPPA is not overbroad." Finally, the Court of Appeals for the Fourth Circuit also considered and rejected the Ninth Circuit's opinion in the instant case and held in *United States v. Mento*, 231 F.3d 912, 923 (4th Cir. 2000): "We hold that the CPPA does not impermissibly regulate protected speech and does not, therefore, offend the First Amendment."

Amici contend that this Court should reverse the Ninth Circuit and uphold the Act. *Amici* agree with the holdings in the other circuits, with the decision of the District Court below, *Free Speech Coalition v. Reno*, N.D. Cal. No. C 97-0281 SC (8-12-97), 1997 WL 487758, as well as the dissenting opinion of Judge Ferguson of the Ninth Circuit: "In sum, the CPPA is not, as the majority claims, an attempt to regulate 'evil ideas.' Instead, the CPPA is an important tool in the fight against child sexual abuse. The CPPA's definition of child pornography provides adequate notice of the type of images that are prohibited and does not substantially encroach on protected expression. Accordingly, I would find the CPPA constitutional." *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1103-04 (9th Cir. 1999) (Ferguson, J., dissenting).

ARGUMENT

I. THE CPPA IS A CONSTITUTIONALLY VALID ACT OF CONGRESS THAT SERVES A COMPELLING INTEREST IN PROTECTING REAL CHILDREN FROM SEXUAL ABUSE AND EXPLOITATION.

A. The Early History of Federal Investigative Efforts to Combat Child Pornography Demonstrates the Dynamic Nature of the Child Pornography Trade.

For more than twenty years, federal and state efforts have been directed against the scourge of child sexual abuse and exploitation through child pornography. Since that time, the original federal law has been amended ten times, in response to decisions of this Court and the recognition by Congress that individuals intent on harming children had identified apparent or actual loopholes in the laws. A review of some of these changes and their causes are instructive of the challenge faced by Congress to protect our children and justify the purpose of Congress in amending those laws, both in the past and in the instant case.

In the seminal case concerning the constitutionality of prohibiting the knowing distribution of child pornography, *New York v. Ferber*, 458 U.S. 747, 749 (1982), this Court, a generation ago, was already aware that "the exploitive use of children in the production of pornography has become a serious national problem." In upholding the New York law, the Court identified several state interests that were both compelling and vindicated by allowing "the States ... greater leeway in the regulation of pornographic depictions of children." *Id.* at 756. These interests include: "safeguarding

the physical and psychological well being of a "minor;"[2] "[t]he prevention of sexual exploitation and abuse of children;" [3] closing "the distribution network for child pornography;"[4] and, minimizing the economic motives that constitute "an integral part of the production of such materials."[5] These findings formed the basis of the Court's holding that child pornography "is not entitled to First Amendment protection." *Ferber* at 765.

In spite of the Court's clear statement that criminal sanctions may be imposed on child pornography regardless of its obscenity, the demand for this material continued to grow. By 1988, law enforcement was investigating the use of computers to facilitate the distribution of child pornography. Producers and distributors of child pornography embraced the technology early, as both a networking tool and a means of distributing child sex images. Congress responded by passing the Child Protection and Obscenity Enforcement Act of 1988 (Pub. L. No. 100-690), amending 18 U.S.C. § 2251-56, to specifically prohibit the use of computers to transport child pornography.

The next challenge confronting prosecutors on the federal level and in many states involved an inability to prosecute individuals for simple possession of child pornography. This loophole meant that the compelling government interest "to stamp out this vice at all levels in the distribution chain," could not be accomplished without prohibiting private possession. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

In *Osborne*, at 110-111, this Court upheld Ohio's possession law against First Amendment and overbreadth challenges, for the reasons that the "ban on possession and viewing encourages the possessors of these materials to

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[2] *Ferber*, at 756,757
[3] *Id.* at 757.
[4] *Id.* at 759.
[5] Id at 761.

destroy them" and because "pedophiles use child pornography to seduce other children into sexual activity".

Following *Osborne*, Congress enacted the Child Protection Restoration and Penalties Enhancement Act of 1990, adding 18 U.S.C. § 2252 (a)(4) to prohibit possession of three or more items of child pornography. The pedophile community again sought out opportunities to evade the law. The newsletter of the North American Man/Boy Love Association pointed out that possession of one or two publications would not trigger federal law and provided a roadmap to their readers on evading the law. *See* NAMBLA Bulletin, March 1991, vol. 12, no. 2, p. 8. In 1998, Congress changed the possession sections to prohibit any one piece of child pornography. *See* Pub. L. No. 105-314.

By 1990, the statutory scheme prohibiting a broad spectrum of activity involving production, possession, and distribution of child pornography appeared complete. Aggressive state and federal investigative and prosecution efforts were making a substantial impact on domestic traffic in child pornography and increasing child safety as a result.

B. The CPPA is a Necessary Tool to Protect Children in an Environment Where Technology Threatens the Government's Entire Effort to Protect Children from Sexual Exploitation.

In 1991, law enforcement witnessed the child pornography underground embrace computer technology with startling speed. To address this situation, the United States Customs Service in 1993 initiated "Operation Long Arm" to identify individuals in the United States who were using foreign-based computer Bulletin Board Systems to import child pornography. This change from physical movement of materials and people to electronic distribution of child pornography anywhere in the world without having

to cross borders, pick up mail, leave one's home, or meet face-to-face, radically changed the nature of the investigation and prosecution of such cases. Congress recognized that the ability of law enforcement and the courts to identify child pornography involving the actual abuse of children was becoming technically dated and that a modernization of federal law was necessary to provide the same protections for minor children as the prior law sought to provide under the previous state of technology.

In 1995, the newest national investigative program, FBI's "Innocent Images," executed over one hundred search warrants throughout the United States on a single day. The operation focused on the use by pedophiles of the world's largest interactive computer service, America Online, to trade child pornography, stalk children for sex, and network with other pedophiles. That task force continues to handle several hundred investigations. The recent explosion of the use of online systems having global reach via the Internet, World Wide Web, and Usenet represents the gravest challenge to law enforcement's efforts to protect children from sexual exploitation and abuse.

As the methods used to transmit and traffic in child pornography have changed, so has the nature of the material itself. Most of the prior child pornography confiscated up until the mid-1990's appeared to have been created in the 60's, 70's, and 80's, as determined from hair, clothing, and decorating fashions widely used during those decades. Since the pedophile underground moved their operations to the Internet and commercial online services, however, an increasing amount of online child sex material has been newly created, making it more difficult for law enforcement to find the original of an image from an old magazine or the original media and creation methods used.[6] The problems

[6] *See* Statement of Deputy Chief Postal Inspector Jeffrey Dupilka, p. 4, Senate Hearing on CPPA, June 4, 1996.

posed by this new electronic pedophile network are obvious and Congress acted to combat these problems in a reasonable, necessary, and limited fashion in CPPA.

These changes in the child pornography trade required law enforcement to adapt existing techniques, create new ones, and watch as prior law enforcement successes were undone.[7] Illustrative of the hard lessons learned is the case of *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995). In that case, the defendant challenged his "Long Arm" conviction for domestic possession and foreign importation of child pornography on several grounds, including a challenge to the authenticity of the computer downloaded images as provable photographs of real children engaging in the sex acts. Defendant contended, "that the depictions had been altered and were not of actual children." *Id.* at 733.

At trial, Defendant Kimbrough introduced expert opinion from a computer image technician that there existed widely available computer software and hardware that could be used to alter images so that they would appear to be children and/or allow the creation of entirely computer generated images of children. *See* Testimony of Kyle Hargrove, *U.S. v. Kimbrough*, N.D. Tex. No. 1-93-CR-031-01-C, Transcript at 288-93, 308-09, where the defense witness stated:

> Computer imaging technology is generally available, including scanners to turn visual images into digital files capable of being altered by computer and software available for $100.00 to $550.00; *Tr.* at 289-90.
>
> "[J]ust a few hours basic training, self-taught training using a tutorial that is supplied with [image altering software], ... anybody with a basic computer knowledge could learn"; *Tr.* at 299.
>
> Software exists which allows individuals to accomplish age regression or progression; *Tr.* at 291-92.

[7] *See* Statement of Deputy Assistant Attorney General Kevin DiGregory, p. 14, Senate Hearing on CPPA, June 4, 1996.

> Even pixel level examination may not discover such manipulation or generation, *i.e.* there may be insufficient detail to discern telltale signs. *Tr.* at 308-09.

This defense claim was not based on an examination of the Government's evidence of child pornography recovered from defendant, but rather, was offered as a type of *de facto* "reasonable doubt" defense. Moreover, the claim was all the more difficult to disprove because the defendant was not claiming that he had altered or generated the alleged child pornography, but that others may have. *Tr.* at 319-20. He thus challenged the nature of the photographs, as well as the requisite scienter. *Kimbrough*, 69 F.3d at 733.

In the *Kimbrough* case, the jury accepted the Government's evidence that the photos were real before being uploaded onto the computer BBS, from both the forensic exam of the images and because the federal agents were able to find old magazines that showed the identical source photographs and the Court of Appeals was able to affirm the trial court's finding that the Defendant knowingly imported actual child sex photos of real minors. *Id.*

The Government's ability to disprove the assertion that the children depicted do not really exist but are computer altered or created images was disappearing. As new child pornography, which post-dates the widespread availability of computer technology that allow the creation of seamless and indistinguishable images, is created, there would be a built-in argument for reasonable doubt in every case. This is the loophole closed by Congress in CPPA, and not an expansion of child exploitation laws to include previously serious and presently serious works of art or literature or works of political or scientific value. Prosecutors would have been forced to identify the child who is being sexually exploited in the challenged depiction, a virtually impossible task, especially when depictions of foreign children are used. Without CPPA to add a child pornography statute to

compliment the prior child exploitation statute, technology would have helped protect a pedophile who rapes and then photographs children far from home, since it is unlikely that state or federal law enforcement could mount national and international searches and find the children exploited in every case. *See* S. REP. No. 104-358.[8]

C. THE FINDINGS OF FACT AND COMMITTEE REPORT SPECIFY THAT THE CPPA IS DIRECTED AT A NARROW CATEGORY OF CHILD PORNOGRAPHIC MATERIAL THAT IS NOT PROTECTED SPEECH.

The Findings of Fact in the preamble of the Act set forth Congress' intents and purposes in enacting CPPA. These Findings are the conclusions of Congress after input from various public and private entities and a hearing supporting the need for the Act. Moreover, the accompanying SENATE COMMITTEE REPORT provides additional and important contextual material, which not only underscores the Findings, but belies Respondents' allegations of possible overbreadth. Thus, the Findings of Fact and the SENATE REPORT provide a context to evaluate Respondents' claims.

Specifically the Findings of Fact reveal CPPA's focus on the impact new technologies have on sexual exploitation of children. *See* S. REP. at 2-3 and annotations to § 2251 (for reprint of Act's Findings). The SENATE REPORT, at 7, begins with a clear explanation of the Purpose of the CPPA:

> This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual

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[8] *See also* Statement of Bruce A. Taylor, National Law Center for Children and Families, pp. 9-10, 37, Senate Hearing on CPPA.

depictions that appear to be of minors engaging in sexually explicit conduct that are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct. Child pornography, both photographic and computer-generated depictions of minors engaging in sexually explicit conduct, poses a serious threat to the physical and mental health, safety and well-being of our children. In addition, the development of computer technology capable of producing child pornographic depictions virtually indistinguishable from photographic depictions of actual children threatens the Federal Government's ability to protect children from sexual exploitation and the production, distribution and possession of materials produced using minors engaging in sexually explicit conduct.

Thus, CPPA is directed at digital images that pose the same threat to children as photography involving actual children or material which is pandered as actual child pornography.[9] Viewed against this backdrop, it is reasonable

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[9] Congress was correct to prohibit traffic in these four forms of such child pornography: that which is (1) true child pornography (actual minors engaging in actual sexual conduct); (2) synthetic or counterfeit child pornography (computer or artificially created images that are so realistic and authentic in appearance that they appear to be of actual minors engaging in actual sexual conduct); (3) composite or morphed child pornography (images using parts of an actual child's image and combining or altering it to create another image showing that child's face or body engaging in sexual conduct); and (4) realistic, but fraudulent child pornography (adult sex materials that were pandered in their promotion or distribution so as to be taken as or considered to be child sex images). All four of these types of child pornography pose the same threat and risk to actual children in the present and

to consider child sex images to be "real child pornography," whether those images are produced with a camera's eye or a computer's brain. Both actual and counterfeit child pornography will pass for the real thing and incite pedophiles to molest and children to be victims.

If the pedophile and the child victim cannot tell the difference, there is no difference in the effect conveyed, and the knowing act of disseminating and collecting images that the distributor or possessor believes are real is a form of conduct not to be protected under the First Amendment. This Court should conclude that the actions of those who knowingly engage in producing, distributing, or collecting such child sex images are not engaged in protected expression and that their actions sexually exploit and harm children and that the tools of that unprotected activity are contraband as "child pornography."

With improvements to the new technologies available to create material which is indistinguishable from photographic child pornography, and the marketing, use, and creation of deceptively life-like materials intended to feed pedophile lusts, the problem will continue to be exacerbated, requiring concomitant changes in law and law enforcement. Moreover, the harms caused by actual child pornography will now be perpetrated by the counterfeit/synthetic/morphed types of child pornography. Legal distinctions between these types becomes irrelevant as the practical differences disappear when technology makes it possible to fabricate child sex images that are as life-like and life threatening as original photos of child sexual abuse. Today, readily

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future, since they would all have the same seductive effect on children and the same incitement effect on pedophiles. None of these materials has serious literary, artistic, political, or scientific purpose and none is "speech" entitled to First Amendment protection when balanced against the compelling interest in preventing its contribution to child sex abuse and exploitation.

available and inexpensive computer software elevates cut-and-paste morphing and photo editing to a techno-art form, which can be difficult to discern even with careful expert examination. Present technology is improving to the point where even careful expert examination may not be sufficient to detect an expert forgery.

The material encompassed by the CPPA is a powerful criminal tool in lowering inhibitions of children. As recognized in the SENATE REPORT, at 13-14:

> A child who may be reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photos, can sometimes be persuaded to do so by viewing depictions of other children participating in such activity. Child molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers. Peer pressure can have tremendous effect on children, helping to persuade a child that participating sexual activity such as that depicted in the material is "all right."

This type of morphed material is much more than mere "erotica," as previous "cut-and-paste" efforts were. It is what it appears to be, child pornography, especially to the pedophile who creates, uses, or collects it. The pandering of such material to children, other pedophiles, or to the child pornography underground as a whole cannot be permitted if there is to be any hope of stopping the explosion of child sexual exploitation and abuse. Your *Amici* submit that the evidence and legislative bases are conclusive that the risk to children from the creation, distribution, and possession of such material is real, extremely grave, and a clear and present danger, thus justifying this enactment.

D. THE COURT OF APPEALS CLEARLY ERRED IN ITS FINDING THAT THERE IS NO CONSTITUTIONALLY COMPELLING INTEREST FURTHERED BY THE ACT.

The Ninth Circuit read the seminal decision of this Court in *Ferber* to identify a *single* compelling interest justifying the exclusion of child pornography from First Amendment protection. According to the Court below, this interest exists only where "actual children are involved in the illicit images either by production or depiction." *Free Speech Coalition,* 198 F.3d at 1095. *Amici* agree with the dissent that the Court below ignored "that the Supreme Court has already endorsed many of the justifications Congress relied on when it passed the CPPA." *Id.* at 1099 (Ferguson, J., dissenting).

In addition to misreading the pronouncements of the Court in *Ferber* and *Osborne,* the Court of Appeals dismissed the Congressional Findings of Fact, which not only constitute a major part of the legislative history, but were passed as part of the CPPA and constitute the primary statement of Congressional intent and purpose.

Amici submit that the Congressional Findings include justifications that were recognized by this Court as compelling (*i.e., Osborne*, at 111, n. 7) and include findings that link computer-generated images with harm to real children (a nexus even the Court of Appeals admits would allow "the law … to withstand constitutional scrutiny," *Free Speech*, at 1094.) *See* COMMITTEE REPORT, S. REP. No. 104-358, at 2-3. For example, Finding (6), recognizes the reality, based on legislative hearings, that current technology allows the alteration of child pornography depicting real children to preclude identification as either real or a specific child. S. REP. at 2. It also finds the ability of such technology to "alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct." *Id.*

Based upon the testimony of experts, the Congress also found that the child pornography within reach of the statute

would result in its use to "seduc[e] or break[] down the child's inhibitions to sexual abuse or exploitation." S. REP. at 2. The use of virtual images will also contribute to "the market for the sexual exploitative use of children." *Id.* at 3. Perhaps most importantly, the Congress recognized that "the sexualization and eroticisation of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them." S. REP. at 2.

Amici contend that the Court of Appeals created a false standard to be required of Congress before it can act even in an area where it has "greater leeway." *Ferber* at 765. *Amici* respectfully pray that this Court reject the Ninth Circuit's substitution of its own unsupported conclusions for the documented legislative findings of the Congress.

II. THE 1996 ACT CONSTITUTIONALLY PROHIBITS TRAFFIC ONLY IN CHILD PORNOGRAPHIC MATERIAL WHICH IS INDISTINGUISHABLE IN ITS APPEARANCE AND USE FROM ACTUAL DEPICTIONS OF REAL CHILDREN AND IS NOT CONSTITUTIONALLY VAGUE OR OVERBROAD.

A. THE CPPA IS A NARROWLY TAILORED LAW THAT IS NECESSARY TO FURTHER A GOVERNMENT OBJECTIVE OF SURPASSING IMPORTANCE.

The CPPA is narrowly tailored to enable the Government to "prevent ... sexual exploitation and abuse of children," which this Court recognized as a "government objective of surpassing importance." *Ferber*, 458 U.S. at 757.

The Free Speech Coalition claims that the CPPA is unconstitutionally overbroad. Since the Act applies to only a specifically limited category of child images, its prohibitions do not apply to Respondents' adult pornography traffic, as

they described their own activities and works, and no overbreadth exists as to them. *See Ferber*, at 767.[10]

The two main arguments submitted by *Amici* are that the CPPA is not unconstitutionally vague or overbroad and is supported by a rational and compelling governmental purpose, because it prohibits only an unprotected, narrowly defined category of visual materials. The Act does only that which is needed to solve a specific, serious technological and legal problem. By it's plain terms, the law prohibits traffic only in child pornography that was either real and prohibited by pre-existing law or is such a realistic counterfeit that it appears, under the circumstances, to be of an actual minor engaging in sexually explicit conduct. If the material is not "real" or does not appear to be "real" under the circumstances, then it is not prohibited from the streams of commerce. The new law neither "bans" the use of "young looking adults" in pornographic movies such as Plaintiffs-Respondents claim to produce (though they could still be obscene under other state or federal laws), nor prohibits the use in legitimate "Hollywood" movies of underage actors in non-sexual scenes or the use of young looking adults as "body doubles" in simulated sex/nudity scenes.

Furthermore, the new provisions are so easy to avoid violating that no one can validly claim to be self-restraining any legitimately valuable work. To avoid application of the new law, all one need do is use adults in visual depictions of explicit sexual conduct (as per existing law) and not "pander" the sexual activities of "young looking adults" as being actual sex acts by actual minors. Respondents' claim that they comply in this regard. Hollywood complies in this regard. Only a pedophile or child pornographer would have

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[10] *See also St. Martin's Press v. Carey*, 605 F.2d 41, 44 (2nd Cir. 1979, where a challenge to New York's law was dismissed for lack of justiciable case or controversy, since there was no threat of prosecution of "Show Me!" as child pornography.

an interest in representing a picture or computerized image that appears to be of a child as being "real" child porn. If the image appears to be computer generated, if it is an obvious fake that does not fool the naked eye, then CPPA does not apply to its transportation/possession, even if "pandering" is fool heartedly attempted. Hollywood studios and even those who produce "adult" pornography don't represent their "young looking adults" to be minors engaging in illegal sex depictions. If they did or do, then such conduct should not be protected. Since there has been no allegation or evidence in this case submitted or argued by Plaintiffs-Respondents to indicate that they violate the Act, there is no record of any "overbreadth" to protected expression, real or substantial, as would be required by *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) ("the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep"). Any hypothetical arguments that CPPA will unconstitutionally chill protected expression are not only outside the plain meaning and clearly stated intent of the Act, they are even less worthy of concern and even more *de minimis* than the hypotheticals rejected by the Supreme Court in *Ferber*, 458 U.S. at 773-74.

Amici submit that it is unfair and unreasonable to now ask this Court to presume the federal courts will interpret and apply § 2252A in an unintended and overbroad manner. This Court, as did the District Court below, should uphold the Act's plainly legitimate proscriptions on child pornography that is made to look or pandered as real, as this Court also did in *Ferber*, where it held, at 74:

> Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, [New York's law] is "not substantially overbroad and ... whatever overbreadth may exist should be cured through

> case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

B. The Government's Compelling Interest in Proscribing Material from Commerce that Appears to be Actual Child Pornography, or Which is Realistic and Pandered as Such, is Fully Supported by This Court's Precedent.

In *Ferber*, at 754, quoting *Chaplinski v. New Hampshire*, 315 U.S. 568, 571-72 (1942), the Court began by reminding that limitations on speech have long been recognized:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene .... It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

In so doing, the Court reemphasized that governments are entitled to protect public order and safety and noted the test for determining that materials fall outside First Amendment protection when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake." *Ferber* at 763-64. With the advent of new technologies that did not exist when the Court decided *Ferber*, the Government was and is faced with an overwhelming evil that threatens the safety of children.[11]

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[11] The Congressional Findings of Fact set forth, among others, the following threats to children: (1) new photographic and computer imaging technologies make it possible to produce visual depictions

Appellees argue that the Act should not apply whenever sexual material does not portray actual children. *Amici* contend that Appellees' argument would create one of the most pernicious effects of realistic synthetic material - that computerized child porn images could undermine the entire Governmental effort to protect children. In fact, experts on the enforcement of child pornography laws testified in the hearing before the Senate that pedophiles were already trying to use the gap in the old child pornography statutes to defend their trade in sexual depictions of actual children. *S. REP.* at 15-20. *See also Kimbrough*, 69 F.3d at 733.

C. THE CLEAR LANGUAGE OF THE CPPA SPECIFIES THAT, WHERE MATERIAL USING ADULTS IN THE ROLE OF CHILDREN FOR LITERARY OR ARTISTIC REASONS IS NOT PANDERED AS CHILD PORNOGRAPHY, THE ACT DOES NOT APPLY.

Amici contend that the plain language of the statute makes clear that the Act is not applicable to depictions of adult sexuality or depictions of adults cast to represent the role of minors where the fact of the adult actor's majority is not hidden or the material is not pandered as real child

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of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children; (2) child pornography, whether real, produced using new technologies, or material pandered as child pornography may be used to seduce, overwhelm, or overcome the resistance of children whether the material consists of photographic depictions of actual children or visual depictions produced wholly or in part by new technologies or other means; (3) a pedophile's sexual appetite is stimulated and whetted just as effectively whether the material is real or simulated if he does not know the difference; and (4) the potential of harm to children increases as the amount of child pornographic materials increases.

pornography. Section 2252A only prohibits traffic in materials which are real or appear to be real, and are intended to appear as real pictures of the sexual exploitation of children. Both of these forms of "child pornography" sexually exploit and present a clear and present danger to actual children, a harm the Government has a compelling interest in proscribing. As *Ferber* recognized that "real" child porn is a crime scene photo that damages that child, this Court in *Osborne*, at 111 and n. 7, recognized that the existence of child pornography poses a threat to children because it incites pedophiles to molest and seduces children into becoming victims. *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999). In this regard, child pornography is not only a crime scene photo of yesterday's molestation, it is a criminal tool for tomorrow's abuse. Since that which is real or appears so real that it is indistinguishable from the real thing will have the same effect on pedophiles and child victims, both types of authentic or counterfeit images are equally unprotected and Congress can prohibit traffic in both (like similar laws for drugs, currency, and other contraband).

The CPPA, contrary to Respondents' conclusory allegations, is directed at and applies only to the following materials and activities under 18 U.S.C. § 2256 (8):

> (A) The production, distribution, or possession of a visual depiction which was created by using an actual minor engaging in sexually explicit conduct;
>
> (B) The production, distribution, or possession of a visual depiction which is, or appears to be, of an actual minor engaging in sexually explicit conduct;
>
> (C) The production, distribution, or possession of a visual depiction which was created, adapted, or modified to appear to be an identifiable minor engaging in sexually explicit conduct; and
>
> (D) The advertising, distribution, promotion, presentation, or otherwise pandering of material in such a manner as to convey the impression that it

really is a visual depiction of an actual minor engaging in sexually explicit conduct.

In each case, the focus is either on material which is created as a result of child sexual abuse or which conveys the impression that it was so created. In either event, the resulting material is "child pornography" to pedophiles and becomes both incitement and tool for the sexual abuse and exploitation of actual children – a form of conduct and unprotected material which Congress has a right and a duty to prohibit. This Court has a similar right and obligation to interpret this law so that only this type of child pornography is known to fall within the legitimate scope of the CPPA. Furthermore, this Court has the ability and the duty to so construe and declare that § 2252A is constitutional in this respect and that it goes no further, thus saving the CPPA as constitutional and narrowed to the constitutionally permissible limits that Congress intended.

The duty of federal courts to construe a federal law within constitutional limits so as to save it was recognized in *Ferber*, at 769 n. 24: "When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limited construction."

Respondents argue that the terms "appears to be a minor" and "in such a manner that conveys the impression that the material is or contains a visual depiction of a minor" are facially vague. This argument, however, fails to account for the Congressional Findings of Fact that are part of the Act. *Amici* contend a person of ordinary intelligence can comprehend the terms and affirmative defenses to the statute as excluding speech that enjoys constitutional protection. Congress anticipated the objections now asserted and the Act was written and intended to eliminate such unconstitutional applications, thus leaving a fully constitutional statute, both

on its face and as applied, which this Court can and should uphold within these proper limitations.

The CPPA, 18 U.S.C. § 2256 (8) (A-D), defines "child pornography" by describing the types of material prohibited without any reference to content, ideas, or message. The Act does not contain any language that premises the legality of a particular depiction upon what it communicates. For example, subsection (B) prohibits such depictions regardless of whether they are done to advance either an anti-child pornography position or a pro-pedophile agenda. It does not bar such visual depictions on the basis that they merely offend the sensibilities of "some" adults. Viewpoint, composition, artistic merit, or opinion are not mentioned or included. Instead, subsection (B) affects only material that "appears to be" actual child pornography.

Though the Act's language is sufficiently clear, the types of visual depictions covered by the term "appears to be" is also explained in the Congressional Findings as images which are "*virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.*" S. REP. at 2 (emphasis added).

Congress included the affirmative defense to assure that speech that does not fit the statute remains lawful unless it violates pre-existing laws. For example, a legitimate movie of *Romeo and Juliet* could imply that teen lovers engaged in sexual activity, but use adult stand-ins to simulate those sequences, and the studio would not imply or advertise that the nude scenes were actually being performed by underage actors and the credits would identify both the minor lead actors as well as the body doubles. The studio would not pander the nude scenes as child pornography and would not violate the Act because the Act would not apply. It is conceivable, however, that a pedophile could fraudulently pander an out-take as real child sex scenes in an attempt to

trade it with other pedophiles or seduce a child victim. *Hilton, supra.*

If an artist, regardless of intent, created an obvious drawing or painting of sexual activity portraying minors, such work would fall outside of the Act's reach. If it were a sculpture, it would appear to be a statue, not a picture. Thus Donatello's or Michaelangelo's *David*, are not child pornography for that reason. Likewise a photo of those statues or the paintings of cherubs on the Sistine Chapel are not child pornography. Also, a reasonable person would not consider such non-prurient, artistic nudity to be a "lascivious" or "lewd" exhibition of the genitals. As this Court noted in *Ferber*, at 775, Congress may, to vindicate its compelling interest in protecting children from sexual abuse and exploitation, "forbid ... attempts to render the portrayal somewhat more 'realistic'...". The Act's lack of interest in content, viewpoint, ideas, or messages is not only clearly evidenced by the lack of any normative or value-laden language, but also by the stated purpose of the Act. Respondents argue that the "primary" purpose behind the "appears to be" and "conveys the impression" provisions is to prohibit child pornography, even when it does not depict actual children because it "stimulates the sexual appetites and encourages the activities of child molesters and pedophiles, who use it to feed the sexual fantasies." S. REP. at 25, 36-38. *Amici* submit that this is only one of the legitimate rational bases for the Act. *Amici* further submit that other interrelated and context sensitive purposes of the Act (*see* Congressional Findings and SENATE REPORT), include the "technological advances ... [which] ma[ke] possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct". S. REP. at 7. Congress found that, because of the many criminal uses to which the new type of

computerized child pornography can be put, it contributes to the overall growth of the illicit and dangerous trade in child pornography. The Act was a necessary tool to "encourage the possessors of such material to rid themselves of or destroy the material thereby helping to protect the victims of child pornography and to eliminate the market for the sexual exploitative uses of children." S. REP. at 3, ¶ 12.

Amici submit that real *and* realistically synthetic child pornography pose clear and present dangers to society by equally inciting molesters to crimes against minor children. *See Osborne*, 495 U.S. at 111, and n. 7. Again, if the pedophile being aroused and the child being seduced do not know the difference, there is no difference. Material which everyone knows is of adults is not at issue. As Dr. Victor Cline testified to the Senate Hearing on CPPA, S. REP. at 13:

> [P]edophiles ... use child pornography and/or create it to stimulate and whet their sexual appetites which they masturbate to then use later as a model for their own sexual acting out with children. ... The man always escalates to more deviant material, and the acting out continues and escalates despite very painful consequences. With a large majority of them an underlying thread is the use of child, adolescent, or adult pornography to stimulate appetite and provide modes of sexual abuse as well as be used as tools to seduce new victims. In my experience, it's the child pornography that is the most malignant.

Section 2252A prohibits trafficking in realistic material pandered to convey the impression that minors are engaging in sexually explicit conduct. What is prohibited is not a message or idea, or even the material itself in all circumstances, but using the streams of commerce to pander counterfeit material as if it were, in fact, actual child pornography. Just as a pornographer made his otherwise

non-obscene material "non-mailable" by his pandering advertisement scheme in *Ginzburg v. United States*, 383 U.S. 463, 475-76 (1966), so can a pedophile or child pornographer make his own conduct unlawful by misusing the facilities of interstate or foreign commerce and fraudulently misrepresenting his wares. Pandering such fraud is an act, not protected speech, and can be and should be made unlawful, as was done in this Act.

The CPPA should be upheld as facially valid. The restrictions do not compromise the discussion of mere ideas or the distribution of truthful, serious communications. What it seeks is to prohibit individuals from knowingly adding to the trade in child pornography where images that appear to be child pornography, whether by design or subterfuge, harm the Nation's children. *Amici* submit this rationale is sufficient to reverse the decision below.

III. The Governments of Great Britain and Canada Enacted Legislation Parallel to CPPA.

The United States is not alone in its efforts to deal with the production, distribution, and possession of computer-generated or morphed child pornography. The governments of Great Britain and Canada had enacted statutes similar to CPPA in their efforts to deal with the new technologies.

Great Britain

In 1994, the British Parliament enacted the Criminal Justice and Public Order Act of 1994 (CJPOA), amending the Protection of Children Act of 1978 to prohibit production and distribution of "any indecent photograph or pseudo-photograph of a child."[12] The Act also amended Section 160

[12] See *Atkins v. Director of Public Prosecution*, 2 All ER 425, 1 WLR 1427 (Queen's Bench, Div. Ct., 8 March 2000) (LEXIS: UK Cases), upholding the Act and narrowly interpreting Act not to apply to obvious fakes, but to apply only to apparent photographs. Court held that "an image made by an exhibit which obviously consisted of parts of two different photographs taped together could not be said to 'appear to be a photograph,' although if it were itself photocopied the result could well be said to constitute a pseudo-photograph."

of the Criminal Justice Act of 1988 to include possession of "pseudo-photographs" of children. The CJPOA defines "pseudo-photograph" as:

> (7) "Pseudo-photograph" means an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph
> (8) If the impression conveyed by a pseudo-photograph is that the person shown is a child the pseudo-photography shall be treated for all purposes of this Act as showing a child and so shall a pseudo-photograph where the predominant impression conveyed is that the person shown is a child notwithstanding that some of the physical characteristics shown are those of an adult.

Canada

In 1993, Canada amended §163.1 of its criminal code to include computer generated pornography that "shows a person who is or is depicted" as a child.[13] That section criminalizes the production, distribution, and possession of such child pornography, defined as:

> In this section, "child pornography" means
> (a) photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,

[13] See *Regina v. Sharpe*, No. 27376, 2001 S.C.C.D.J. 42, 2001 Can. Sup. Ct. LEXIS 8; 2001 SCC 2 (Can. S. Ct. Jan. 26, 2001), upholding the Act and authoritatively construing the offense and defense provisions: "The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?"

> that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
> the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years

Section 163.1(5) provides a defense to the production provision, which is similar to that provided in 18 U.S.C. § 2252A (c). It reads as follows:

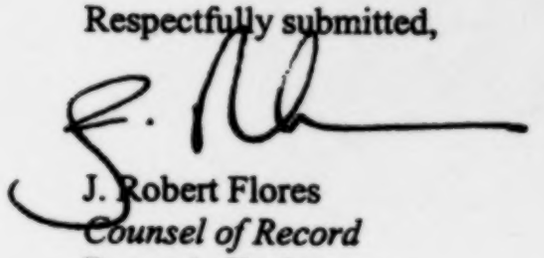
> It is not a defense to a charge under subsection (2) . . . unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.

CONCLUSION

Amici respectfully submit that the CPPA is a necessary tool for the Government in its effort to protect real children from sexual abuse and exploitation. *Amici* contend that without the CPPA the entire statutory scheme will be undermined. The Nation's children deserve protection from sexual exploitation and Congress created a narrowly tailored statute to address only those materials that are virtually indistinguishable from pornographic materials already prohibited under 18 U.S.C. §§ 2251, 2252, 2256. This Honorable Court should uphold the new law as a narrowly drawn prohibition against real and realistic child pornography. There is no difference to the children and no difference to the molesters. The law need find no difference. Legitimate concerns and objections were met and accommodated by Congress in the limitations of the statutory elements and in protections of affirmative defenses.

Therefore, your *Amici Curiae* respectfully ask this Honorable Court to reverse the decision of the Court below and find the CPPA to be a Constitutional exercise of Congressional prerogative.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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